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IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY, SOUTH CAROLINA

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, GEORGIA, HAWAII, INDIANA, IOWA, KANSAS, MISSISSIPPI, MISSOURI, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute, should be construed to toll the statute of limitations on State-law claims in State courts against a political subdivision of a State.

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STATEMENT OF INTEREST

The interest of the *Amici* States in this case is similar, and in some respects identical, to their interest in *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002). There, this Court held that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), should not be read to toll State statutes of limitations on claims against non-consenting States filed in federal court but later dismissed on Eleventh Amendment grounds. Here, as in *Raygor*, the *Amici* States have a strong, general interest in controlling the timing rules applicable to State-law claims litigated in State courts. And the *Amici* States have a particularly vital interest in controlling the application of those rules to claims against State-created entities, whether it be a State university (as in *Raygor*) or, as here, one of the State's own political subdivisions.

As this Court has repeatedly recognized, statutes of limitations and related tolling rules "are not simply technicalities," but are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). Accordingly, as this Court put it more than 160 years ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839).

As the court below recognized, a State's sovereign interest in these timing rules is heightened considerably where, as here, the defendant is a State-created entity such as a political subdivision. In that context, the timing rules are an important element of a State's decision regarding the extent to which State entities will be entitled to sovereign immunity under State law. The ability to control the waiver of a State entity's

sovereign immunity is an important attribute of State sovereignty, just as the ability of the United States to control the sovereign immunity of its own political subdivisions and other federal entities is an important aspect of the United States' sovereignty. Indeed, as this Court recently explained, just as federal territories are subject to plenary control by the United States government, so also "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232 (2002) (citing *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-08 (1991)).

As interpreted by petitioner, and by the United States as intervenor, Section 1367(d) would impinge significantly upon both of these sovereign interests—the ability to set the timing rules on the litigation of State-law claims in State courts and the ability to control a political subdivision's entitlement to sovereign immunity under State law. Accordingly, as they did in *Raygor*, *Amici* have a powerful interest in ensuring that Section 1367(d) is not interpreted expansively in this case.

STATEMENT OF FACTS

The essential facts are as follows. The claims at issue in this case arise out of the death of Carl Jinks on October 18, 1994. Petitioner, his estate, commenced an action in federal district court against Richland County, South Carolina, alleging federal constitutional claims under 42 U.S.C. § 1983, as well as supplementary state law claims under the South Carolina Tort Claims Act. The district court ruled in favor of the county on the Section 1983 action, and dismissed the state claims without prejudice. Plaintiff then filed this action in the State Court of Common Pleas for Richland County on December 18, 1997.

However, the statute of limitations for the state action expired on October 18, 1996, fourteen months prior to the

date the action was filed in State court. The South Carolina Supreme Court unanimously ruled that if Section 1367 were construed to have tolled the statute of limitations during that fourteen-month period, it would violate South Carolina's sovereignty by effectively altering the terms on which the State had agreed to waive the sovereign immunity of its political subdivisions, including respondent Richland County. Finding that nothing in the Constitution—including the Necessary and Proper Clause and Congress's authority in Articles I and III to ordain and regulate the lower federal courts—expressly or by necessary implication authorized such an intrusion upon State sovereignty, the court ruled that Section 1367(d), as so construed, was beyond Congress's power and therefore violated the Tenth Amendment.

SUMMARY OF ARGUMENT

In *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002), this Court faced an issue virtually identical to the issue presented here. There, the State defendants argued that, under this Court's Eleventh Amendment cases, 28 U.S.C. § 1367(d) was unconstitutional as applied to arms of non-consenting States. But rather than decide that issue, the Court determined that Section 1367(d) did not need to be construed so broadly. And, because of the constitutional doubt and reallocation of federal-state power such a construction would create, the Court construed that provision as not applying to arms of non-consenting States.

Here too, a State-created defendant argues, and the South Carolina Supreme Court held, that under this Court's Tenth Amendment decisions, Section 1367(d) is unconstitutional as applied to political subdivisions of non-consenting States. And here too, although the argument for unconstitutionality is compelling, the Court can and should avoid the constitutional issue by declining to read the provision as extending to claims against the States' political subdivisions.

The interpretation advanced by petitioner would invade the States' traditional sovereignty in at least two significant ways. First, as a general matter, it would invade the States' sovereign prerogative to regulate the litigation of State-law claims in State courts. Second, as applied here, it would intrude upon the States' prerogative to determine the conditions under which its political subdivisions will be subject to suit under State law, in the State's own courts.

Because State sovereignty is presumed in the structure of the Constitution, such an intrusion upon the States' prerogatives can be effected, if at all, only pursuant to an enumerated power. Yet the argument (advanced by the United States as well as petitioner) that this power is implicit in Congress's power under Articles I and III to ordain and establish lower federal courts cannot withstand analysis. That power obviously gives Congress the authority to regulate procedures in federal courts and, indeed, to set time limits for claims under federal law. But that authority cannot reasonably be thought to empower Congress to regulate litigation of State-law claims in *State* court, any more than Congress's authority to establish and regulate certain Executive-branch offices can be thought to empower Congress to regulate the conduct of State executive officers. Cf. *Printz* v. *United States*, 521 U.S. 898, 934 (1997). To sustain Section 1367(d) on that theory would be to give Congress the ability to transform the States' own subdivisions into "mere subdivisions" of the United States. Cf. *New York* v. *United States*, 505 U.S. 144, 166 (1992).

At a minimum, as in *Raygor*, petitioner's interpretation of Section 1367(d) would alter the traditional federal-state balance in regulating litigation against a State's political subdivisions, without the requisite clear statement necessary for such an alteration. As both the majority and the concurrence in that case emphasized, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention

to do so unmistakably clear in the language of the statute." 534 U.S. at 543 (internal quotations marks omitted) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). Because Section 1367(d) is conspicuously devoid of any such clear intent, petitioner's interpretation of that provision cannot be squared with *Raygor* and must be rejected.

Amici thus urge the Court to do here what it did in *Raygor*: construe Section 1367(d) as excluding claims against this defendant and similarly situated State-created entities, and allow Congress to determine whether it is really necessary to decide the constitutional issues posed by petitioner's interpretation.

ARGUMENT

The fundamental flaw in petitioner's presentation is that it ignores this Court's earlier analysis, in *Raygor*, of the very statute at issue here. Petitioner's failure even to cite *Raygor*, much less discuss it, is especially surprising given that the petition for certiorari relied heavily on that decision.[1] What is even more surprising is that both the petitioner and the Solicitor General fail to mention the doctrine of statutory interpretation that the Solicitor General pressed there, and on

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[1] Petitioner's Petition for Certiorari commenced as follows:

> In *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S. Ct. 999 (2002), this Court held that the tolling provision, 28 U.S.C. § 1367(d), that is part of the federal supplemental jurisdiction statute, cannot constitutionally apply to claims filed in federal court against non-consenting States. In the course of that decision, this Court indicated that there might be some "serious constitutional doubt" as to whether the tolling provision impermissibly abrogates state sovereignty "when a State consents to suit or a defendant is not a State." This case raises that unanswered question.

Pet. for Cert. at 2 (citation omitted).

which both the majority and the concurrence in *Raygor* relied in refusing to interpret Section 1367 to extend to non-consenting States: the doctrine of constitutional doubt.

To be sure, the decision of the South Carolina Supreme Court did not rely upon this doctrine, perhaps because it did not believe it would be appropriate for a State court to adopt a narrowing construction of a federal statute. Cf., *e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 944 (2000) (holding that the Court is "'without power to adopt a narrowing construction of a state statute'"). Instead, that court held that the extension of Section 1367(d) to subdivisions of a State would exceed Congress's powers under Article III and thus run afoul of the Tenth Amendment.

Although *Amici* agree with this ruling, this Court need not go that far. It is sufficient to conclude, as this Court did in *Raygor*, that petitioner's interpretation of Section 1367(d) would create a legitimate doubt as to the provision's constitutionality. Alternatively, it is sufficient to conclude, as *Raygor* also did in the context presented there, that petitioner's interpretation of Section 1367(d) would at least alter the traditional federal-state balance in regulating litigation against a State's political subdivisions, and that Section 1367(d) does not contain the requisite clear statement of an intention to alter that balance. By either rationale, Section 1367(d) should not be interpreted to preempt State statutes of limitations when invoked by political subdivisions of the State against State-law claims in State court.

I. UNDER THE CONSTITUTIONAL DOUBTS DOCTRINE APPLIED IN *RAYGOR*, SECTION 1367(d) SHOULD NOT BE CONSTRUED TO EXTEND TO SUITS BROUGHT AGAINST POLITICAL SUBDIVISIONS OF STATES.

For well over a century, this Court has made clear that if "'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and

by the other of which such questions are avoided, our duty is to adopt the latter.'" *Harris* v. *United States*, 122 S. Ct. 2406, 2413 (2002) (citing *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)); see also *The Mayor* v. *Cooper*, 73 U.S. (6 Wal.) 247, 251 (1867) ("Every doubt is to be resolved in favor of the constitutionality of the law.") This longstanding doctrine is based upon the Court's "respect for Congress, which [it] assume[s] legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991). This respect requires that where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted.) *Accord New York* v. *United States*, 505 U.S. at 170 ("'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'") (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237-38 (1998) ("'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'") (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Although *Raygor* did not squarely resolve the issue presented here—the extent to which Section 1367 should be interpreted to apply to State-created entities other than States themselves—the Court did note that this posed a serious constitutional issue. See 534 U.S. at 547 ("We express no view on the application or constitutionality of § 1367(d) . . . when a defendant is not a State."). Moreover, one of the holdings of *Raygor* was that it is "fairly possible" to read that

statute as *not* extending to non-consenting States. It necessarily follows that it is likewise "fairly possible" to read the statute as not extending to the States' political subdivisions.[2]

Nor can there be any serious question that petitioner's interpretation of this provision would create substantial constitutional doubts. As shown below, petitioner's interpretation would invade the States' traditional prerogatives in at least two significant ways, without the requisite constitutional basis. First, application of Section 1367(d) to any defendant invades the States' prerogative to fix the limitations periods for State-law claims litigated in State courts. Second, as the court below held, application of that provision to the political subdivision of a non-consenting State intrudes upon the States' prerogative to determine the conditions under which its political subdivisions will be subject to suit and possible liability under State law, in the State's own courts.

A. Application Of Section 1367(d) To Any Defendant Raises, At A Minimum, Significant Constitutional Doubt.

By its terms, Section 1367(d) intrudes upon the traditional powers of State legislatures and courts to fix the limitations periods—including tolling rules—for State-law claims filed in State courts. As far as *Amici* have been able to ascertain, an encroachment this direct upon State authority to regulate activity in State courts is without precedent in the history of this nation.

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[2] Specifically, this Court held that the general grant of jurisdiction in Section 1367(a), and the phrase "any claim" in Section 1367(d), do not necessarily encompass claims against an "arm" of a non-consenting State. *Raygor*, 534 U.S. at 541-42. *A fortiori*, the statute need not be read to encompass a claim against a political subdivision of a non-consenting State.

1. There can be no doubt that, except where constrained by the federal Constitution, the litigation of State claims in State courts is a matter of State rather than federal authority. As Chief Justice Marshall observed, the State courts are not "inferior" to federal courts "because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807). Thus, as this Court put it recently in *Felder* v. *Casey*, no one can dispute "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. 131, 138 (1988).

As this Court has long recognized, moreover, statutes of limitations, and related tolling rules, "are not simply technicalities," but are "fundamental to a well-ordered judicial system." *Tomanio*, 446 U.S. at 487. Accordingly, as this Court put it in *M'Elmoyle*, 38 U.S. (13 Pet.) at 327, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." Put another way, "'[t]he period sufficient to constitute a bar to the litigation of [stale] demands, is a question . . . which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988) (second alteration in original). In short, the ability to set rules relating to the timeliness of State-law claims brought in a State's own courts is a fundamental attribute of State sovereignty.

As the United States concedes (U.S. Br. at 26-27), Section 1367(d) intrudes directly upon that sovereign power. By its terms, it displaces State tolling rules whenever a State does not give tolling effect to the filing of a suit in federal court. *Id.* at 27. In so doing, it "interferes with [the] state policy choices" underlying those rules. *Id.* Moreover, by forcing State courts to entertain suits that would otherwise be barred

by the State's own rules, Section 1367(d) imposes obligations and costs on States that the States would otherwise prefer not to bear.

It is also significant that Section 1367(d) is, as far as *Amici* are aware, unique among all the provisions of the U.S. Code dealing with court rules and procedures. No other federal statute of which we are aware has ever purported to regulate procedural rules applicable to State-law claims litigated in State courts during peacetime. The examples of such statutes cited by petitioner and the United States in their briefs, in particular the civil war statute at issue in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), all concerned congressional acts passed during wartime to deal with wartime exigencies, and pursuant to Congress's express war powers. No such necessity exists to justify Section 1367(d). Accordingly, Section 1367(d) is a stark departure from past congressional practice and from the respect that Congress has traditionally accorded to the authority of the States to regulate procedures applicable to State-law claims litigated in State courts.

2. *Amici* do not mean to say that Section 1367(d) lacks any policy justification. It may well, as petitioner and the United States argue, promote judicial efficiency in the sense of minimizing the sum of costs expended on the same claim in both the federal and State courts. See Pet. Br. at 16; U.S. Br. at 20-25. Indeed, if federal and State courts were creatures of the same sovereign, that sovereign might rationally decide, in the interests of *overall* efficiency, that the State courts must suffer some increase in costs and burdens in order to reduce the overall costs and burdens imposed on both systems. And such a sovereign might well decide, as the American Law Institute did in proposing Section 1367(d), and as the United States phrases it in its brief, that Section

1367(d) strikes a sensible "balance" between the "interests" of the States and the federal courts. See U.S. Br. at 21-25.[3]

However, previous decisions by this Court make clear that Congress is not entitled to treat the States or their instrumentalities as mere parts of a single, unitary sovereign. See, *e.g.*, *New York* v. *United States*, 505 U.S. at 166 ("even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts"); *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty"); *Printz*, 521 U.S. at 928 ("It is an essential attribute of the State's retained sovereignty that they remain independent and autonomous within their proper sphere of authority"). As this Court put it just last Term, "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002) (citing *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991)). Accordingly, the States remain sovereigns in their own right. And Congress—even when acting at the behest of a respected organization such as the ALI—may impose such burdens on them only if some provision of the Constitution "explicitly or

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[3] The American Law Institute's study recommended that a tolling provision be adopted for all claims originally filed in federal court but later dismissed and refiled in state court. It urged such a provision "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." American Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* ix (1969) (quoting Chief Justice Earl Warren, Opening Address at the 36th Annual Meeting of the American Law Institute (May 1959)).

by necessary implication" authorizes Congress to impinge upon State sovereignty. See, *e.g.*, *Alden*, 527 U.S. at 739 (The federal government "'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'").

3. No constitutional provision authorizes such action here. The sole constitutional authority pressed with any vigor by the United States is "Congress's general constitutional authority to prescribe the jurisdiction of the federal courts" under Articles I and III, coupled with the Necessary and Proper Clause of Article I. U.S. Br. at 25-26, 30. But nothing in those provisions—which authorize Congress "[t]o constitute Tribunals inferior to the supreme Court" (U.S. Const. art. I, § 8, cl. 9) and, equivalently to "ordain and establish . . . inferior Courts" (*id.* art. III, § 1)—expressly or by necessary implication authorizes Congress to override the States' sovereign authority to regulate their *own* courts, especially when applying the States' own laws.

In this regard, the inferior courts provisions are not like Section 5 of the 14th Amendment, or even the Commerce Clause, both of which permit Congressional intrusion upon certain aspects of State sovereignty when that intrusion is incident to Congress's exercise of its power to regulate subject matter enumerated in Article I or some other provision of the Constitution. The "inferior courts" provisions authorize Congress to create and regulate federal courts, but they say nothing about whether Congress may regulate the activity of State courts.

Moreover, given that State sovereignty is presumed in the structure of the Constitution, it would be most unnatural to read the provisions authorizing Congress to "ordain," "establish," and "constitute" the federal courts to do the same with respect to State courts. Indeed, interpreting the "inferior courts" provisions of Articles I and III to authorize Congress to intrude upon the management of State courts, particularly

the litigation of State claims in State courts, would be contrary to the whole theory underlying the creation of a separate federal judiciary. One of the purposes of that feature of the national government was to avoid commandeering the judiciaries of the States into federal service except, for example, where necessary to meet the exigencies of war. See, *e.g.*, *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870) (discussing Stay Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864)); 50 U.S.C. app. § 525 (The Soldiers' and Sailors' Relief Act of 1940).

Inferring an authority to override State sovereignty solely from the "inferior courts" provisions of Articles I and III is all the more doubtful in light of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny. Among other things, those decisions hold that federal courts are constitutionally bound to "defer to the decisions of state courts on issues of state law," such as State limitations periods and other timing rules. *Bush* v. *Gore*, 531 U.S. 98, 112 (2000). See *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 112 (1945); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980); *Wilson* v. *Garcia*, 471 U.S. 261, 269 & n.17 (1985) ("[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling"). Indeed, as the Court explained in *Ragan*, "[w]e cannot give the [claim] longer life in federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. at 533-34.

The practice of deferring to State judgments on such matters "reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush*, 531 U.S. at 112. It also reflects the fact that "the Constitution 'recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.'" *Rummel* v. *Estelle*, 445 U.S. 263, 303 (1980) (Powell, J.,

dissenting) (citing *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)).

If Congress cannot constitutionally prescribe or alter limitations periods for State-law claims being litigated in *federal* court, *a fortiori* it cannot constitutionally regulate the limitations periods applicable to State-law claims litigated in *State* court.[4]

Nor can Section 1367(d)'s intrusion into State sovereignty be justified under the Necessary and Proper Clause, notwithstanding the United States' contention that Section 1367(d) "promotes the proper exercise of federal jurisdiction," and "furthers the effective operation of the

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[4] The United States also suggests, in passing, that Section 1367(d) might be justified under Congress's authority "to provide a cause of action to redress constitutional violations committed by persons acting under color of state law" (U.S. Br. at 30) because, absent that provision, "plaintiffs who file Section 1983 actions in federal court" might otherwise be "deprived of avenues of redress otherwise available to them under state law." *Id.* at 30 n.7. But, in the circumstances presented here, that suggestion does not withstand even the most cursory analysis. A plaintiff concerned about maintaining a State-law claim arising out of the same conduct as that challenged in a Section 1983 action can simply file such a claim in state court and ask that it be stayed pending the outcome of his federal action. Thus, Section 1367(d) is not even "necessary," much less "proper," under Congress's authority to redress constitutional violations under Section 5 of the 14th Amendment.

Moreover, nothing in Section 5 implies an authority to override the States' sovereign interests in regulating their political subdivisions' amenability to suit, and to potential liability, in *State* court under *State* law. Section 1367(d), as interpreted by petitioner and the United States, is thus a far cry from federal-law suits against political subdivisions, which this Court has assumed to be within Congress's power under Section 5. *See, e.g. Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

overall scheme" established by 28 U.S.C. § 1367(a) and (c). U.S. Br. 25-26. That theory would allow virtually limitless intrusions by Congress upon the States' authority to regulate litigation in their own courts under their own laws. While the Necessary and Proper Clause is necessarily broad and flexible, it cannot be construed so broadly that it permits Congress to take any action, however invasive of State prerogatives, that makes it marginally easier or more convenient for a federal litigant to bring a pendent State claim in federal court. Otherwise the Necessary and Proper Clause would swallow the Tenth Amendment.

Indeed, if Congress can regulate State tolling rules under the guise of overall judicial efficiency, why can it not also regulate other aspects of State-court litigation? For example, would Congress not have a general power, under the Government's theory, to *require* that State courts stay any lawsuit raising issues similar to those under consideration by a federal district court, so as to avoid "duplicative" decision-making? Indeed, would it also not have the power to bar State courts from awarding relief—such as punitive damages or damages for pain and suffering—that for some reason is not as readily available in federal court, so as to avoid giving plaintiffs an "artificial" disincentive to file their claims in federal court?[5] Conversely, would it not have the power to force State courts to adopt rules that are as friendly to plaintiffs as the rules available in federal court, so as to avoid

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[5] Many States have rules that are generally considered more friendly to plaintiffs than corresponding rules in federal court. Mississippi, for example, allows plaintiffs to join together in a single suit more easily than they can in federal court. *See* Miss. R. Civ. P. 20. New York allows no pre-trial discovery of parties' expert witnesses, which makes it more difficult for a defendant to develop a defense to a plaintiff's expert's theories. *See* N.Y. C.P.L.R § 3101(d). All else being equal, such rules would of course encourage a plaintiff to file suit in State rather than federal court.

giving plaintiffs an artificial incentive to bring their actions in federal rather than State court?[6] And would it not, indeed, have the power to promulgate, say, a nationwide body of evidence law, applicable in State as well as federal courts, on the theory that this would reduce overall litigation costs?

The United States acknowledges that Section 1367(d) impinges upon State authority "to a degree," U.S. Br. 27, but then proclaims, as it did in *Printz*, that the Supremacy Clause sweeps aside any constitutional concerns about interference with State prerogatives, *id.* at 27-28. However, as in *Printz*, reliance on "the Supremacy Clause merely brings us back to the question discussed earlier," that is, whether the law at issue here "violate[s] state sovereignty and [is] thus not in accord with the Constitution." 521 U.S. at 924-25. Or, as the Court put it in *Alden*, "[a]ppeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." 527 U.S. at 731.

Obviously, if Congress acted validly and pursuant to one of its enumerated powers in enacting Section 1367(d), the Supremacy Clause would make that provision binding upon the States, even if it displaced the States' policy choices. But that is not the issue here. The issue is whether, in enacting Section 1367(d), Congress validly acted pursuant to an enumerated power. If it is uncertain whether Congress had the power to enact Section 1367(d)—and the analysis above

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[6] Many States likewise have rules that are generally considered more friendly to defendants than corresponding rules in federal court. For instance, Illinois still requires "fact" pleading rather than "notice" pleading, thereby making it somewhat more difficult to develop a complaint for filing in State court than in federal court. *See* 735 Ill. Comp. Stat. Ann. 5/2-601. New York allows a defendant to receive an automatic stay of trial-court proceedings by appealing the denial of a summary judgment motion. *See* N.Y. C.P.L.R. § 3214. All else being equal, such rules would tend to encourage plaintiffs to file their cases in federal court rather than State court.

establishes that, at very least—then Section 1367(d) raises constitutional doubt.

In short, the theories advanced by petitioner and the United States would seem to give Congress virtually limitless power to regulate practice and procedure in State courts, based on the direct or indirect effects those procedures might have on litigation in federal courts. It is doubtful that those who wrote the Constitution envisioned so sweeping and intrusive a power when they gave Congress the authority to "ordain and establish" inferior federal courts. Under well-established precedent, Section 1367(d) should be construed to ameliorate that doubt.

4. Even if one could infer from the inferior courts provisions of Articles I and III a Congressional power to interfere with State-court litigation of State-law claims, Section 1367(d) is, at least arguably, too great an intrusion upon State sovereignty to be considered "proper" under the Necessary and Proper Clause. Many federal laws regulate State-court litigation indirectly by, for example, providing a *federal* defense to certain State-law claims. See, *e.g. Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (preempting certain defect claims against automobile manufacturers); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (preempting certain claims against pharmaceutical manufacturers based on their dealings with the federal Food and Drug Administration). And a few federal rules regulate the litigation of *federal* claims and defenses in State courts. *E.g.*, Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* 637 (3d ed. 1988).

However, as noted above, no other federal law of which we are aware purports to regulate directly the litigation of purely *State-law* claims in State court. And the absence of any federal-law claim or defense in that situation makes it far more intrusive upon State sovereignty than a law that regulates the litigation of federal claims or provides (pursuant

to a separate constitutional grant of authority) a federal defense to a State cause of action. Cf., *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947) (holding that Congress may provide for the adjudication of federal claims in state court); *FERC* v. *Mississippi*, 456 U.S. 742, 770 (1982) (requiring state administrative agencies to apply federal law while acting in a judicial capacity).[7]

Indeed, when a federal law regulates the litigation of federal claims or defenses in State court, the State court is acting, to some limited degree, pursuant to the authority of the United States and in fulfillment of its oath to uphold the federal Constitution. See, *e.g.*, *Printz*, 521 U.S. at 925-29 (analyzing justification for requiring State courts to adjudicate federal claims). However, in the absence of a federal claim or defense, a State court is necessarily acting solely pursuant to its authority under State law. Thus, a federal law that directly regulates State-court procedures in that circumstances is, in essence, regulating the State court's exercise of authority received from another sovereign—the State itself.

Thus, if a decision on this issue were required in this case, *Amici* would ask that the Court adopt a bright-line rule forbidding Congress to regulate State-court procedure in the

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[7] In that respect, Section 1367(d) is far more intrusive than the handgun law that this Court struck down in *Printz*, and the federal naturalization requirements discussed at length by the majority and dissent in that case. 521 U.S. at 950; *id.* at 970-71 (Souter, J., dissenting). There, at least, Congress was regulating State officials' implementation of federal law, whereas Section 1367(d) purports to regulate State officials' implementation of *State* law. As the Court put it in *Alden*:

> [i]t would be an unprecedented step . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds . . . its power to press other branches of the State into its service.

527 U.S. at 752.

absence of a substantive federal claim or defense, validly created pursuant to a separate grant of Constitutional authority. See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 952 (2001) (arguing that "Congress has no authority to prescribe procedural rules for state courts to follow in state law cases"). And, if it were necessary, *Amici* would ask the Court to apply that bright-line rule in this case and hold that, whether or not Section 1367(d) is "necessary" to Congress's exercise of its authority over inferior federal courts, it plainly is not "proper" because it represents an improper intrusion upon State sovereignty, as applied to any defendant.

B. There Is Ample Support For The Narrower Conclusion Of The Court Below That Extending Section 1367(d) To Political Subdivisions Of Non-Consenting States Exceeds Congress's Powers Under Articles I And III.

Although the extension of a State's statute of limitations with respect to any defendant is itself a significant and unwarranted intrusion upon State sovereignty, the Court need not rest its decision on that general intrusion. That is because, in this case, the defendant is a political subdivision of the State and is subject to suit under State law only because the State has made a conditional waiver of its subdivision's sovereign immunity. Accordingly, petitioner's interpretation of Section 1367(d) would work a separate intrusion upon State sovereignty, namely, a State's authority to set the conditions on which to waive, not only its own immunity, but also the immunity of its political subdivisions under State law.

1. There can be no serious doubt that the ability to control the waiver of a political subdivision's sovereign immunity is an important attribute of sovereignty. For example, political subdivisions of the United States—including its territories and the District of Columbia—have traditionally enjoyed the sovereign immunity of the United

States except to the extent a waiver has been mandated or allowed by Congress. *E.g.*, *Marx* v. *Government of Guam*, 866 F.2d 294, 298 (9th Cir. 1989) ("[T]he government of Guam has inherent sovereign immunity."). And the ability to control the terms on which such waivers occur, including the procedures and timetables under which claims will be litigated, is certainly an important attribute of the sovereignty of the United States. *Sun Oil Co.*, 486 U.S. at 726 (holding that the right to determine the statute of limitations is a fundamental aspect of State sovereignty).

The same is true with the States. A county or a municipal corporation is as much a creature of a State as a territory is a creature of the United States. As this Court recently said, "'political subdivisions are components of'" the State. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. at 2232. Just as a territory derives its authority and, indeed, its very juridical existence from the United States, so also cities and counties derive their existence and authority from the States. See, *e.g.*, S.C. Const. art. VIII, § 1 ("The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law."). And, just as a territory or the District of Columbia can exercise only those powers conferred upon it by Congress (see U.S. Const. art. I, § 8, cl. 18; *id.* art. IV, § 3, cl. 2), so also a city or county can exercise only those powers conferred upon it by the State that created it. See, *e.g.*, Haw. Const. art. VIII, § 1 ("Each political subdivision shall have and exercise such powers as shall be conferred under general laws.").

Indeed, throughout our history, States have employed their political subdivisions to carry out much of the States' work in serving their citizens. In colonial times, for example, "Massachusetts had virtually no administrative apparatus of its own but used the towns for such purposes as tax gathering. In the 1830s Tocqueville observed this feature of government in New England and praised it for its ideal combination of

centralized legislation and decentralized administration." S. Beer, *To Make a Nation: The Rediscovery of American Federalism* 252 (1993). Even today, many if not most States provide a host of essential services, not directly, but through the cities, counties and towns that they have created, and for which they often provide a large part of the funding.

In short, as this Court recently put it, "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. at 2232 (citing *Wisconsin Pub. Intervenor*, 501 U.S. at 607-08). Accordingly, "a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision." *Id.* at 2230. Given that political subdivisions are creatures of the State, it follows that any federal rule that alters the relationship between a State and its political subdivisions is an intrusion into State sovereignty.

Moreover, just as the United States claims for itself the right to control the terms on which its political subdivisions will be subject to suit, as well as their potential liability, so also do the States claim that same authority with respect to their political subdivisions.[8] In short, a State's ability to control the terms on which its political subdivisions are subject to suit, as well as their potential liability, is as

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[8] *See, e.g.*, *McMillian* v. *Monroe County, Ala.*, 520 U.S. 781, 789 (1997) (citing Alabama's sovereign immunity provision, which specifies that a county sheriff is absolutely immune from all suits for damages based upon his official acts); *State* v. *Hogg*, 535 A.2d 923, 927 (Md. 1988) ("[T]he State's sovereign immunity not only protects the public treasury but also protects the State and its instrumentalities from standing trial."); *Gray-Hopkins* v. *Prince George's County, Md.*, 309 F.3d 224, 232 (4th Cir. 2002) (holding that while the counties' governmental immunity is "'much narrower than the immunity of the State, [it is] nevertheless . . . derived from the State's sovereign immunity.'").

important an aspect of State sovereignty as it is of federal sovereignty.

For all these reasons, the States have an even stronger interest in controlling the terms on which State-law claims will be litigated in State court against their own political subdivisions than they do in controlling the terms on which such claims will be litigated against other defendants.

2. Here, the South Carolina Torts Claims Act governs claims against the State's political subdivisions. That Act states unequivocally that "an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered." S.C. Code Ann. § 15-78-100(a). Petitioner's interpretation of Section 1367(d) would essentially override that portion of the statute which reads "two years," replacing it with the phrase "at least three years and two months." And it would do so, not in federal court, but in the State's own courts.

Admittedly, there may be sensible policy reasons for such a rule—if, that is, one were to view the United States and the States as part of a single sovereign entity. However, as noted above (*supra* at 11), this Court's decisions make clear that Congress cannot treat the States as mere "prefectures or corporations" of a single, national sovereign. *Alden*, 527 U.S. at 758. Under petitioner's interpretation of Section 1367(d), the statute impinges on State sovereignty and thus can be sustained only if the Constitution authorizes it expressly or by necessary implication.

3. Neither petitioner nor the United States attempts to make this requisite showing. Instead, they deny that such a showing is necessary because (in the words of the United States) "[t]he South Carolina Supreme Court's reference to 'the State's sovereign authority to establish the terms under which its political subdivisions may be sued' . . . posits a constraint on *federal* power that does not exist." U.S. Br. at 33 (citation omitted). They reason that, unlike States

themselves, cities and counties have no *Eleventh Amendment* immunity from suit under this Court's decisions. *Id.* at 32 (citing *Alden*, 527 U.S. at 756; *Board of Trs.* v. *Garrett*, 531 U.S. 356, 368-69 (2001); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)). They then reach the unqualified and sweeping conclusion that, because cities and counties have no Eleventh Amendment immunity, their "susceptibility to private suits is subject to *congressional* control, notwithstanding the contrary preferences of state officials." *Id.* at 33 (emphasis added).

This remarkable conclusion is fundamentally wrong, not only as a matter of federalism, but as a matter of logic. The fact that cities and counties do not enjoy complete *Eleventh* Amendment immunity from suit does not, for purposes of the *Tenth* Amendment, diminish the intrusion upon State sovereignty of a provision that (as interpreted by petitioner) deprives the States of their traditional ability to set the terms on which their own political subdivisions will be subject to suit under the State's own laws, in the State's own courts. See *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). The two facts simply have no logical connection. Nor does the absence of such immunity effectively make cities and counties creatures of the federal government rather than the States, as the United States seems to imply.

Moreover, the attempt by petitioner and the United States to answer a Tenth Amendment question with an analysis of this Court's Eleventh Amendment jurisprudence was squarely rejected in *Printz*. As the Court put it there, "the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity [and] we have refused to apply it to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment." 521 U.S. at 931 n.15 (citations omitted).

Thus, to establish the constitutionality of their interpretation of Section 1367(d), as applied to cities and counties, petitioner and the United States would have to identify some provision of the Constitution that—expressly or by necessary implication—authorizes a significant abridgment of State sovereignty. See *supra* at 16-17. That they do not even attempt to meet that burden is sufficient to establish a genuine doubt as to the constitutionality of that provision, as they interpret it.

Nor is it clear how any theory that would authorize this intrusion upon State sovereignty—based on the Constitution's "inferior courts" provisions or Section 5 of the 14th Amendment—would not also authorize even more sweeping intrusions. If Congress has the authority under those provisions to toll the limitations period on claims against political subdivisions where the claim has previously been pending in federal court, why could it not simply establish a single, national limitations period, applicable in both State and federal court, for *all* State-law claims against a State's political subdivisions? Proponents of such a rule would no doubt argue that it derives from Congress's power to establish inferior courts because it would ensure that plaintiffs from different States would be treated "fairly" with respect to each other when they bring their actions in federal court. But it would represent an enormous intrusion upon the management of State-court litigation against State-created entities.

Similarly, if Congress has the authority under the "inferior courts" provisions or Section 5 to toll the limitations period on State-law claims against political subdivisions, why can it not also regulate other aspects of State procedure applicable to such claims, such as rules regarding pleading and discovery, so as not (according to Congress's preferences at the time) to artificially encourage or discourage the filing of such claims in federal court? Here again, the theories suggested by the petitioner and the United States would seem to have no logical stopping point.

4. Finally, even if some authority could be found in the Constitution for application of Section 1367(d) to a State's political subdivisions, that action would still be too great an intrusion upon State sovereignty to be "proper" under this Court's precedents. As explained above, Section 1367(d) is a very significant intrusion upon State sovereignty when applied to any defendant. However, it is a truly enormous intrusion when applied to a State's political subdivisions.

To appreciate the importance of this intrusion, imagine a federal law that preempted State laws limiting punitive damage awards to $250,000. (Under the theory advanced by petitioner and the United States, Congress would appear to have this authority, inasmuch as the State-law cap would otherwise constrain the amount of punitive damages that could be awarded on State-law claims in federal court.) It would be one thing for Congress to preempt that cap as to private defendants, thereby forcing them to bear the risk of billion-dollar punitive awards. But it would be quite another for Congress to subject State-created cities and counties to such awards. Such judgments could have a significant impact on the States' ability to ensure the provision of necessary governmental services to their citizens, and they could well have an even more direct financial impact on the States themselves.

If interpreted to apply to political subdivisions, Section 1367(d) would implicate the same concerns. Although that statute may not have as great an impact on the amount of potential liability to which political subdivisions are subject, it would have the effect of preserving claims against political subdivisions that otherwise would have expired. Thus, to some extent, the extension of Section 1367(d) to political subdivisions would hinder the States' ability, through those subdivisions, to provide needed government services to the States' citizens.

In short, in this case, as in *Alden*, the authority asserted by petitioner and the United States is, in essence, the power "to

press a State's own courts into federal service to coerce the other branches of the State"—in this case the State's own political subdivisions. 527 U.S. at 749 (citation omitted). Here, as there, that authority "is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* And here, as there, "[s]uch plenary federal control of state governmental processes denigrates the separate sovereignty of the States." *Id.*

For all these reasons, there is at least a serious doubt as to the constitutionality of Section 1367(d) as applied to the States' political subdivisions. This Court can and should avoid that constitutional issue by adopting a narrow construction of that statute, as it did in *Raygor*.

II. PETITIONER'S INTERPRETATION SHOULD BE REJECTED FOR THE SEPARATE REASON THAT SECTION 1367(d) DOES NOT CONTAIN A CLEAR STATEMENT OF CONGRESSIONAL INTENT TO REACH CLAIMS AGAINST THE STATES' POLITICAL SUBDIVISIONS.

Even if this Court were not persuaded that petitioner's interpretation of Section 1367(d) created a sufficient doubt as to its constitutionality, that interpretation should still be rejected under the "clear statement" rule articulated in *Raygor* by both the majority and concurring opinions. *Raygor*, 534 U.S. at 541 ("Congress . . . must make its intention to abrogate unmistakably clear in the language of the statute") (internal quotation marks omitted); *id.* at 549 (Ginsburg, J., concurring) ("if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute") (internal quotation marks omitted).

1. This Court has long held that, even in the absence of a strong constitutional doubt, a federal statute should not be

interpreted in a manner that alters the balance between federal and State governments absent a clear statement to that effect in the federal legislation. For example, in *New York* v. *United States*, the Court declined to construe a provision of the Radioactive Waste Policy Act of 1985 as a "mandate to regulate" based on the principle that, where a particular reading of a statute would "'upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.'" 505 U.S. at 170 (citation omitted). And this Court recently resisted adopting an interpretation of a federal criminal statute because "it invite[d] [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000). The Court then reiterated the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* (internal quotation marks omitted) (citing *Jones* v. *United States*, 529 U.S. 848, 858 (2000)).

The Court articulated the same principle in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), when it was asked to read a provision of the federal bankruptcy code as allowing a case-by-case inquiry into whether the price paid at a foreclosure sale is a "fair market price"—a matter traditionally left to determination under State law. The Court rejected the invitation on the ground that the bankruptcy code expressed no clear congressional intention to that effect. As the Court put it,

> Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national

> authority, those charged with the duty of legislating [must be] reasonably explicit."

Id. at 544 (alterations and omissions in original). See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (holding that "such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result"); *Solid Waste Agency* v. *U.S. Army Corps of Engr's*, 531 U.S 159, 174 (2001) (explaining that Congress did not express an explicit desire to readjust the federal-state balance).

2. This same principle was applied by both the majority and concurrence in *Raygor*, and there can be no doubt that the principle applies here as well. As the *Raygor* majority put it, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 534 U.S. at 543 (internal quotation marks omitted) (quoting *Will*, 491 U.S. at 65). See also *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). The *Raygor* majority cited this principle as a basis for rejecting the argument that Section 1367(d) could be applied to toll a State statute of limitations against a non-consenting State:

> [A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity. Thus, applying the clear statement principle helps "'assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'"

534 U.S. at 544 (second alteration in original) (citing *Will*, 491 U.S. at 65). The concurrence expressed agreement with this conclusion and referred to the clear-statement as an

"ordinary rule of statutory construction." *Id.* at 548-49 (Ginsburg, J., concurring) (internal quotation marks omitted) (quoting *Will*, 491 U.S. at 65).

Under *Raygor*, the clear-statement rule is equally applicable here. As explained at length above (*supra* at 26-27), petitioner's interpretation of Section 1367(d) would substantially alter the traditional balance between federal and state governments in at least two respects. First, it would deprive the States of their traditional authority to fix the limitations periods and tolling rules applicable to State-law claims litigated in State courts. Second, as the court below correctly held, it would intrude upon the States' traditional authority to fix the terms on which it waives the sovereign immunity of its political subdivisions under State law. Thus, as in *Raygor*, petitioner's interpretation "at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity." 534 U.S. at 544.

3. Finally, in light of *Raygor*, it cannot be seriously maintained that Section 1367(d) extends with sufficient clarity to the kinds of claims at issue here.

Significantly, neither petitioner nor the United States even attempts to demonstrate that Section 1367(d) contains the requisite "clear statement" of congressional intent to toll a State statute of limitations as to State-law claims asserted against a political subdivision of a State. And with good reason: *Raygor* itself held that, however broadly Section 1367(d) may be phrased, such "general language [is] insufficient to satisfy clear statement requirements." *Id.* at 545. Instead, the Court held that Congress's intention to reach State defendants must be both "specific" and "unequivocal."

Here, the general language of Section 1367(d), while admittedly broad, does not "specifically" or "unequivocally" toll the State-law statute of limitations against a political

subdivision of a State, any more than it "specifically" or "unequivocally" tolls a State-law statute of limitations against an "arm" of a State such as the State university in *Raygor*. Accordingly, petitioner's interpretation of that provision cannot be squared with *Raygor*, and must be rejected.

* * * *

Amici urge the Court to do here what it did in *Raygor*, specifically, to construe Section 1367(d) as excluding claims against this defendant and similarly situated State-created entities. That will allow the Court to save for another day—and a more appropriate case—the question of whether Section 1367(d) is constitutional as applied to *any* defendant. It will also allow Congress, if it truly believes political subdivisions *should* be subject to Section 1367(d), to pass a statute making that clear, thereby providing an opportunity for this Court to decide definitively whether that action is within Congress's power.

CONCLUSION

For all these reasons and those in respondents' brief, the decision of the Supreme Court of South Carolina should be affirmed on the basis of a narrow construction of Section 1367(d).

Respectfully submitted,

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